

Whether approved for reporting?¹ Yes

For the appellants : Mr. K.S.Banyal, Advocate.

For the respondent(s): Mr. R.K.Gautam, Senior Advocate, with
Mr.Anurag Sharma, Advocate, for
Respondents No.1 to 7 & 9.

Deepak Gupta J.

Smt. Roshani Devi (Appellant herein) is the widow of Jagat Ram, son of Khazana Ram. Her husband died when her father-in-law Khazana Ram was alive. Khazana Ram was the owner of the suit land. Smt. Roshani Devi being the widowed daughter-in-law of Khazana Ram filed a civil suit No.266/92 on 7.9.1991 in forma pauperis. She prayed for grant of maintenance allowance of Rs.500/- p.m. She also prayed for a decree of declaration to the effect that being the daughter-in-law she is entitled to maintain herself from the estate of her father-in-law. It was also prayed that Khazana Ram be restrained by a decree of permanent prohibitory injunction from alienating the suit property in any manner, which may affect her right of maintenance. Along with the suit, an application for interim relief was also filed and the Sub Judge Ist Class,

¹ Whether reporter of local papers are allowed to see the judgment ? Yes

29.11.1991, claiming that he is the owner in possession of the suit land, which is also the subject matter of the present suit and that he had perfected his title to the suit property by way of adverse possession. Khazana Ram admitted the claim of Man Chand and the suit of Man Chand was decreed on 26.12.1991. Thereafter the appellant filed civil suit No.261/92(73/98) on 6.11.1992 out of which the present proceedings arise. In this suit she claimed that the decree obtained by Man Chand against Khazana Ram was a collusive decree to defeat her right of maintenance and to nullify the orders of the court passed in her favour. This suit was contested by Khazana Ram and Man Chand. During the pendency of this suit Khazana Ram expired on 24.7.1993. After the death of Khazana Ram, two of his daughters Harbansi Devi and Naratu Devi were brought on record as his legal heirs. The plaintiff amended the suit and claimed that after the death of Khazana Ram she was entitled to 1/3rd share in the suit property. Man Chand in reply took the defence that Khazana Ram had bequeathed his property by a Will in favour of the sons of Man Chand i.e. Rakesh Kumar and Raj Kumar, who were necessary parties to the suit. It would be pertinent to mention that these sons of Man Chand are not the grand sons of Khazana Ram since they were not born from the womb of the daughter of Khazana Ram. Man Chand was earlier

An application was filed by Man Chand for impleading Rakesh Kumar and Raj Kumar the alleged beneficiaries of the Will as defendants in the suit. This application was contested by the plaintiff and the trial court rejected the application. Aggrieved against the order passed by the trial court Man Chand filed C.R.No.298 of 2001 in this court, which was decided by K.C.Sood, J. on 15.3.2002. With regard to the impleadment of Rakesh Kumar and Raj Kumar he held as follows:

..... “Regarding impleadment of Rakesh Kumar and Raj Kumar, it is noticed, they are neither necessary nor proper parties to the suit.”

Thereafter Man Chand also expired on 20.8.2002. After the death of Man Chand his legal representatives i.e. widow Dolma sons Rakesh Kumar and Raj Kumar (beneficiaries under the Will) and his daughters Rajesh Kumari alias Sureshna, Rekha Devi alias Babli and Asha Rani alias Dimple were brought on record as his legal representatives. During the course of proceedings before the trial court on 16.12.2002 the defendants moved an application in the court that they do not press Issue No.15 qua the Will dated 21.8.1991 alleged to have been executed by Khazana Ram in their favour. Ground given in the application was that

possession was a collusive decree. The trial court also held that since Rakesh Kumar and Raj Kumar had not pressed Issue No. 15 the Will was not proved and therefore the plaintiff Roshani Devi was held to be owner of 1/3rd share of the suit land and decree of possession of the land was passed in her favour. The trial court also recorded that Issue No.7 was not pressed before it. The heirs of Man Chand, including Rakesh Kumar and Raj Kumar filed an appeal before the learned District Judge, Hamirpur. This appeal has been decided by the impugned order dated 7.9.2005. The learned lower appellate court held that Rakesh Kumar and Raj Kumar were necessary parties to the suit. The learned lower appellate court has discussed the order of the learned trial court rejecting the application filed by Man Chand for impleading Rakesh Kumar and Raj Kumar as parties to the suit. Though it has been noticed that CR No.298 of 2001 against the said order dated 22.9.2001 was dismissed by this court, the lower appellate court has not cared to consider the findings rendered in the said Civil Revision and has proceeded to decide the matter as if it was sitting in appeal over the orders passed in the civil revision by this court. The learned lower appellate court also noticed in para No.16 of the judgment that counsel for the present appellants had argued that the defendants had not pressed Issue No.15 before the lower court. This submission of

necessary parties to the suit and ordered them to be added as defendants under Order 1 Rule 10(2) CPC and set aside the judgment of the trial court and remanded the case for decision to the trial court. Against this order of remand the appellants are in appeal before this court.

I have heard Mr.K.S.Banyal, learned counsel for the appellants and Mr.R.K.Gautam learned senior counsel appearing on behalf of the respondents. According to Mr.Banyal, the learned lower appellate court has gravely erred in holding that Rakesh Kumar and Raj Kumar were necessary parties. He submits that once this court had held in the civil revision that they were not necessary parties, it was not within the jurisdiction of the lower appellate court to have held otherwise. He further submits that in view of the fact that Issues No.7 and 15 were not pressed by the heirs of Man Chand the learned lower appellate court was not justified in impleading them as parties and remanding the case. He lastly submitted that the wholesale remand of the case is totally unjustified. On the other hand, Mr.R.K.Gautam learned senior counsel appearing for the respondents has submitted that Rakesh Kumar and Raj Kumar were necessary parties to the suit and therefore the order of the learned lower appellate court was justified. Infact Mr.R.K.Gautam submits that this Court

are neither necessary nor proper parties to the suit. The lower appellate court could not have sat in judgment over the order passed by this Court. I need not say more.

However, in view of the detailed arguments raised before me, I have considered this question again. From the facts, which have been given in detail above, it is apparent that Man Chand and Khazana Ram were in cahoots with each other. They were trying their level best to defeat the rights of Smt.Roshani Devi who was the widow of the pre deceased son of Khazana Ram. Therefore, a collusive decree was obtained by Man Chand to defeat the order of maintenance passed in favour of Smt.Roshani Devi. After Khazana Ram died his legal representatives were brought on record. Even assuming that Rakesh Kumar and Raj Kumar were also the legal heirs the estate of Khazana Ram was duly represented before the trial court. Man Chand, father of Rakesh Kumar and Raj Kumar, was contesting the suit and had specifically raised a plea that Khazana Ram had bequeathed his property in favour of Rakesh Kumar and Raj Kumar by means of a Will. Both sides led evidence to prove/disprove the Will. Smt. Roshani Devi had examined one Laxmi Dutt (PW-6) who was the Registrar at the relevant time who stated that though Will dated 21.8.1991 had been presented before him by Khazana Ram along with

Another important factor, which must be noticed is that not only did the defendants examine a number of witnesses to prove the Will but Rakesh Kumar himself appeared as DW-5 to prove the Will. After Man Chand died all his legal heirs, including Rakesh Kumar and Raj Kumar were brought on record. In case they felt that they should be permitted to lead more evidence, they could have easily filed an appropriate application before the trial court. Instead of doing so they filed an application stating that they do not press issue No.15 on the grounds that they were not made parties to the suit and that had filed a separate suit to establish their right. This was a risk they knowingly took. They should have realized that if they do not press Issue No.15 the issue is bound to be decided against them. Further, it is important to note that trial court had noted that the issue No.7 quoted above was also not pressed before it. Despite this issue having not been pressed before the learned trial court the appellate court proceeded to hear the appellants on the question whether the suit was bad for non joinder of parties without there being any material on record to show that the trial court had wrongly recorded that Issue No.7 had not been pressed before it. It is well settled law that the observations made in any judicial order by a judicial officer are accepted to be correct. The higher courts do not readily draw an inference that any

an objection can be waived and in the present case the defendants specifically waived this objection by not pressing issue No.7. The respondents-defendants voluntarily did not press Issues No.7 and 15 and therefore it was not open for them to challenge the judgment of the trial court on either of the grounds, which were covered by these issues.

The manner in which the defendants have conducted themselves is also not above board. They have successfully for more than 15 years denied the right of maintenance to the plaintiff. As observed above the suit was being contested by Man Chand on all grounds and infact one of the beneficiaries under the Will had appeared in the witness box. They were well aware of the proceedings and were contesting the case on all grounds and had led entire evidence. It is obvious that they just wanted to delay the inevitable and therefore filed the application that they do not press issue No.15. Issue No.7 was also not pressed by them at the stage of arguments. It is apparent that the learned lower appellate court has patently erred in permitting the defendants to raise these issues before it.

To be fair to both counsel I must note that a number of judgments were cited before me. However, all the judgments were with regard to the scope of Order 41 Rules 23 to 25, the scope of Order 41 Rule 33 CPC and also who are necessary parties to the proceedings. Since I have

The parties through their counsel are directed to appear before the lower appellate court on 20th October, 2006. The Registry is directed to ensure that the records of both the courts below are sent to the learned lower appellate court so as to reach there well before the date fixed.

Before parting with this case, I must observe that the learned lower appellate court has dealt with the case in a manner not expected from a senior judicial officer. It not only allowed the appellants to argue issues which were not pressed by them before the trial court but virtually sat in judgment over the order passed by this court in CR No. 298 of 2001. Judicial discipline requires that the courts lower in hierarchy obey and comply with the orders passed by a higher court. The decision of a higher court may be right or wrong but once it attains finality the lower court cannot reopen the questions decided and virtually set aside the order of the higher court. It also needs to be observed that though the learned lower appellate court only passed an order of remand in which no decree is to be drawn, but in the present case a decree sheet has also been drawn up.

September 12, 2006(g)

(**Deepak Gupta**), J.

